

STATE OF MICHIGAN  
IN THE SUPREME COURT

LAURENCE G. WOLF CAPITAL MANAGEMENT  
TRUST and LAURENCE G. WOLF, as trustee and  
individually,

Plaintiffs-Appellees,

Supreme Court No. 130748

Court of Appeals No. 262721

v

Oakland County Circuit  
Court No. 2003-051450-CK

CITY OF FERNDALE, MARSHA SCHEER,  
ROBERT G. PORTER and THOMAS W. BARWIN,

Defendants/Appellants.

130748-1  
**BRIEF OF AMICUS CURIAE ATTORNEY GENERAL IN SUPPORT OF  
DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL**

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## INTRODUCTION

This Court's Order of June 23, 2006, directed the parties to brief the issue of whether the phrase "property damage" in the exception to governmental immunity for proprietary functions, MCL 691.1413, encompasses damages caused by tortious interference with a business relationship, or, more generally, encompasses damages other than damage to physical property. This Court also invited the Michigan Municipal League, the Michigan Townships Association, and the Michigan Association of Counties to file briefs *amicus curiae* on this issue. Because the issue of governmental immunity, and more specifically, statutory interpretation of the language of the exceptions to the Governmental Tort Liability Act, is of vital importance to the State of Michigan in its defense of governmental entities, the Attorney General files this *amicus curiae* brief on the issue identified by this Court.

## SUMMARY OF ARGUMENT

An interpretation of the term "property damage" as used in §1413 that would allow a plaintiff to recover for tortious interference with a business relationship or, more generally, "any damages other than damages to the physical property,"<sup>1</sup> exceeds the Legislature's intent as embodied in the plain language of the proprietary function exception to the Governmental Tort Liability Act (GTLA) and erodes this Court's mandate that exceptions to immunity be narrowly construed. Further, as a practical matter, the Court of Appeals decision, will result in increased liability of all governmental entities engaged in a proprietary function beyond that intended by the Legislature.

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<sup>1</sup> *Wolfe Capital Mgmt Trust v City of Ferndale*, SC: 130748, Order dated June 23, 2006.

## ARGUMENT

- I. The plain language of the proprietary function exception to governmental immunity encompasses only physical damage to tangible, corporeal, physical property. Any other reading of the phrase ignores both the Legislature's choice of the word "property" and this Court's mandate that exceptions to governmental immunity be narrowly construed.**

On December 20, 2005, in *Wolf v Ferndale* the Michigan Court of Appeals reversed the trial court's summary dismissal of Plaintiffs' tortious interference claims on governmental immunity grounds.<sup>2</sup> The Court of Appeals concluded that the claim falls within the proprietary function exception to the City's immunity otherwise accorded under the GTLA.<sup>3</sup> Utilizing definitions of the words "property" and "damage" from a dictionary and American jurisprudence, the Court of Appeals broadly interpreted the phrase "property damage," as used in §1413, to include a collection of rights that encompasses a claim for tortious interference with business purpose.<sup>4</sup> This interpretation ignores both the plain language of the statute and this Court's mandate that exceptions to governmental immunity be narrowly construed.

MCL 691.1413 provides, in pertinent part: "The immunity of the governmental agency shall not apply to actions to recover for bodily injury or property damage arising out of the performance of a proprietary function as defined in this section."<sup>5</sup> In resolving whether a plaintiff's tortious interference claim or claim for damages other than damage to physical property constitutes an action to recover for property damage within the contemplation of § 1413, requires this court to properly interpret the phrase "property damage."

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<sup>2</sup> *Wolf v City of Ferndale*, 269 Mich App 265; 713 NW2d 274 (2005).

<sup>3</sup> MCL 691.1407(1); MCL 691.1413.

<sup>4</sup> *Wolf*, 269 Mich App at 271-272.

<sup>5</sup> MCL 691.1413.

**A. The History of the Governmental Tort Liability Act demonstrates that the Legislature did not intend the language of the exceptions to governmental immunity to be read expansively.**

Although this Court has never specifically addressed the meaning of "property damage" in the context of the governmental immunity exceptions, it has repeatedly observed that governmental immunity legislation "evidences a clear legislative judgment that public and private tortfeasors should be treated differently."<sup>6</sup> This Court has also observed that "a central purpose" of governmental immunity is "to prevent a drain on the state's financial resources, by avoiding even the expense of having to contest on the merits any claim barred by governmental immunity."<sup>7</sup>

Governmental immunity is "a characteristic of government" that was historically recognized at common law until it was abrogated by this Court in *Williams v Detroit*, 364 Mich 231; 111 NW2d 1 (1961).<sup>8</sup> When it enacted the Governmental Tort Liability Act (GTLA), the Legislature reinstituted and preserved this characteristic.<sup>9</sup> As this Court recently recognized in *Costa v Community Emergency Medical Services*, "the primacy of governmental immunity in this case is reinforced by 'the sequence of the judicial and legislative events' forming the backdrop of the GTLA."<sup>10</sup>

As a general rule, under the GTLA,<sup>11</sup> a governmental entity is immune from tort liability for actions that accrue while it is engaged in the performance of a governmental function.<sup>12</sup> This

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<sup>6</sup> *Robinson v City of Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000) (citation omitted).

<sup>7</sup> *Mack v Detroit*, 467 Mich 186 n 18; 649 NW2d 47 (2002).

<sup>8</sup> *Costa v Cmty Emergency Med Servs*, 475 Mich 403, 410 n 2; 716 NW2d 236 (2006) (citing *Mack v Detroit*, 467 Mich 186, 203 n 18; 649 NW2d 47 (2000)).

<sup>9</sup> *Costa*, 475 Mich at 410 n 2 (citing *Mack*, 467 Mich at 202).

<sup>10</sup> *Costa*, 475 Mich at 410 (citing *Mack*, 467 Mich at 202).

<sup>11</sup> MCL 691.1401 *et seq.*

<sup>12</sup> *Reardon v Dep't of Mental Health*, 430 Mich 398, 406-407; 424 NW2d 248 (1988) (citing MCL 691.1407; MSA 3.996(107)).

immunity, however, is subject to five statutory exceptions.<sup>13</sup> It is clear from the circumstances surrounding the enactment of the GTLA that the Legislature did not intend an expansive reading of the language of these exceptions.<sup>14</sup>

**B. This Court's mandate that exceptions to governmental immunity be narrowly drawn, dictates that the proprietary function exception be limited to tangible, physical property damage.**

This Court in *Ross v Consumer Power* redefined the application of statutory immunity to governmental entities, codified in MCL 691.1407(1).<sup>15</sup> *Ross* established the basic principle that the immunity of governmental entities is broad but the exceptions are to be narrowly drawn.<sup>16</sup>

Drawing on this basic principle, this Court has consistently interpreted the language of the five exceptions to governmental immunity narrowly. For example, in *Robinson v City of Detroit* this Court construed the phrase "resulting from" as used within the motor vehicle exception.<sup>17</sup> That exception imposes liability for a plaintiff's injuries "resulting from" the negligent operation of a government vehicle. The Court first noted that the motor vehicle exception must be narrowly construed. Applying the required narrow construction, the Court then held that a plaintiff's injuries did not "result from" the operation of a motor vehicle where the pursuing police vehicle did not hit the fleeing car or otherwise physically force it off the road or into another vehicle or object.<sup>18</sup> This holding specifically overruled the Court's earlier holding

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<sup>13</sup> *Ross v Consumer Power (On Rehearing)*, 420 Mich 567, 593-595, 622; 363 NW2d 641 (1984).

<sup>14</sup> See *Reardon v State*, 430 Mich at 409) (circumstances surrounding the enactment of the GLTA persuaded the court that the Legislature did not intend an expansive reading of the public building exception).

<sup>15</sup> *Ross*, 420 Mich at 567.

<sup>16</sup> *Ross*, 420 Mich at 618.

<sup>17</sup> *Robinson*, 462 Mich at 445-446.

<sup>18</sup> *Robinson*, 462 Mich at 445; see also *Chandler v Muskegon County*, 467 Mich 315; 652 NW2d 244 (2002).

in *Fiser v City of Ann Arbor*<sup>19</sup> that a police officer's pursuit of a fleeing vehicle could fall under the motor vehicle exception as the "negligent operation of a motor vehicle," even where the police vehicle had no physical contact with the fleeing car, another vehicle, or object.<sup>20</sup> Applying the same rule of narrow construction, the *Robinson* Court also rejected its earlier holding in *Rogers v Detroit*<sup>21</sup> that "negligent operation" of a motor vehicle encompasses not only the pursuit itself, but also a police officer's decision to commence the pursuit.<sup>22</sup> Likewise, the *Robinson* Court overruled *Dedes v Asch*<sup>23</sup> by distinguishing the Legislature's use of the word "the" rather than "a" and thus holding that the phrase "the proximate cause" as used in the employee provision of the GTLA, MCL 691.1407(2), means the "one most immediate, efficient, and direct cause preceding an injury, not 'a proximate cause.'" In giving meaning to the specific language chosen by legislature, the court rejected the application of traditional tort law theories of causation.<sup>24</sup>

Another example of the unequivocal application of this rule of narrow construction is found in the Court's interpretation of the public building exception, MCL 691.1406. In *Reardon v State*, the Court held the government is liable for injuries caused by a dangerous or defective condition "of" the building but not for injuries "in" the building, the broader application previously given the exception.<sup>25</sup> The *Reardon* Court noted that the Legislature's use of the terms "repair" and "maintain," and its choice of the phrase "dangerous or defective condition of a public building"—specifically, its choice of the word "of" rather than "in"—indicated the

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<sup>19</sup> *Fiser v City of Ann Arbor*, 417 Mich 461; 339 NW2d 413 (1983).

<sup>20</sup> *Robinson*, 462 Mich at 445, 453.

<sup>21</sup> *Rogers v Detroit*, 457 Mich 125; 579 NW2d 840 (1998).

<sup>22</sup> *Robinson*, 462 Mich at 445, 453, 457.

<sup>23</sup> *Dedes v Asch*, 446 Mich 99; 521 NW2d 488 (1994).

<sup>24</sup> *Robinson*, 462 Mich at 462.

<sup>25</sup> *Reardon v Dept of Mental Health*, 430 Mich at 410.

Legislature's intent that the exception apply only where the physical condition of the building itself causes the injury.<sup>26</sup> The Court supported its conclusion by noting the "broad scope of governmental immunity and the concomitant narrowness of the exceptions."<sup>27</sup>

Similarly, in *Nawrocki v Macomb County Road Commission*, the Court interpreted the language of MCL 691.1402, the highway negligence exception, as creating only one exception to governmental tort immunity, that being the breach of the duty to repair and maintain public highways.<sup>28</sup> The Court rejected the invitation to create a second exception outside the duty to maintain and repair the highway.<sup>29</sup>

Recently, in *Grimes v Michigan Department of Transportation*, this Court once again examined the language of the highway negligence exception, and extended the *Nawrocki* holding by overruling *Gregg v State Highway Department's*<sup>30</sup> conclusion that a shoulder is "designed for vehicular travel."<sup>31</sup> The Court noted that *Gregg's* holding was both internally inconsistent and appealed to inappropriate methods of statutory construction.<sup>32</sup> Consistent with the plain language of the highway exception and the applicable rules of statutory construction, the Court concluded that the Legislature limited the highway exception to the segment of the "improved portion of the highway" that is "designed for vehicular travel," which does not include the shoulder.<sup>33</sup> In reaching this conclusion, the Court adopted a narrow view of the term "travel" that excludes the shoulder from the highway exception.<sup>34</sup>

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<sup>26</sup> *Reardon*, 430 Mich at 409-410.

<sup>27</sup> *Reardon*, 430 Mich at 411-12.

<sup>28</sup> *Nawrocki v Macomb County Rd Comm'n*, 463 Mich 143, 160; 615 NW2d 702 (2000).

<sup>29</sup> *Nawrocki*, 463 Mich at 160.

<sup>30</sup> *Gregg v State Hwy Dep't*, 435 Mich 307; 458 NW2d 619 (1990).

<sup>31</sup> *Grimes v Mich DOT*, 475 Mich 72, 83; 715 NW2d 275 (2006).

<sup>32</sup> *Grimes*, 475 Mich at 83 (citing *Gregg*, 435 Mich at 307.)

<sup>33</sup> *Grimes*, 475 Mich at 89-90.

<sup>34</sup> *Grimes*, 475 Mich at 91.

The Court has also applied a narrowing construction to the proprietary function exception, MCL 691.1406. For example, in *Coleman v Kootsillas*, the Court concluded that the fact that a governmental agency produces a pecuniary profit is not conclusive evidence of a proprietary function.<sup>35</sup> Rather, the Court determined that the intended purpose of the activity, whether a profit is actually generated, where the profit is deposited and how it is used, are important considerations in determining when a government unit is engaged in a proprietary function.<sup>36</sup>

In light of *Ross's* mandate that the exceptions to the government's immunity are narrowly drawn, and this Court's clear and consistent application of that principle of statutory construction, the Legislature's intended use of the phrase "property damage" in the proprietary function exception should be read in the narrowest sense. The broad, all encompassing application provided by the Court of Appeals is contrary to this Court's decisions and should be reversed.

**C. The plain meaning of "property damage" in the proprietary function exception includes only physical damage to physical objects.**

Because the Legislature is presumed to understand the meaning of the language it enacts into law, statutory analysis must begin with the wording of the statute itself.<sup>37</sup> However, the Legislature did not specifically define the phrase "property damage" within the context of the propriety function exception. When a statute does not define a term, this Court gives the words of a statute their plain and ordinary meaning, and looks outside the statute to ascertain the Legislature's intent only if the statutory language is ambiguous.<sup>38</sup> But where the statutory language is unambiguous it should be enforced as written since, this Court presumes the

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<sup>35</sup> *Coleman v Kootsillas*, 456 Mich 615, 621; 575 NW2d 527 (1998).

<sup>36</sup> *Coleman*, 456 Mich at 621-623.

<sup>37</sup> *Carr v Gen'l Motors Corp*, 425 Mich 313, 317; 389 NW2d 686 (1986).

<sup>38</sup> *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995); see also MCL 8.3a; MSA 2.212(1) (all words and phrases shall be construed and understood according to the common and approved usage of the language).

Legislature intended the meaning clearly expressed, and no further judicial construction is required or permitted.<sup>39</sup> Similarly, this Court may not speculate about an unstated purpose where the unambiguous text plainly reflects the intent of the Legislature.<sup>40</sup> Further, when construing a statute, this Court presumes that every word is used for a purpose. The Court may not assume that the Legislature inadvertently made use of one word over another.<sup>41</sup> Rather, the Court has a duty to give meaning to the Legislature's choice of one word over the other.<sup>42</sup>

These rules of statutory construction are especially germane to the issue before the Court because Michigan strictly construes statutes imposing liability on the State in derogation of the common-law rule of sovereign immunity.<sup>43</sup>

1. "Property damage" includes only physical damage.

In drafting the proprietary function exception, the Legislature chose to use the word "property" to modify damage. It did not choose to use the word "economic" as a modifier, which would have encompassed not only physical property damage but also other damages such as economic loss. The addition of "economic" or a similar word would clearly have created broader liability for governmental entities since it would have encompassed but not limited recovery to physical damage. The Legislature chose, however, to use the more narrow term "property." This Court should give meaning to the Legislature's choice of that word and should not assume that the Legislature inadvertently chose "property" when it intended a word or phrase with a broader meaning and a broader avenue for potential recovery against a governmental entity.

2. "Property damage" encompasses only tangible, corporeal, physical objects.

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<sup>39</sup> *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000).

<sup>40</sup> *Lansing v Lansing Twp*, 356 Mich 641, 649-650; 97 NW2d 804 (1959).

<sup>41</sup> *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000).

<sup>42</sup> *Robinson*, 462 Mich at 461.

<sup>43</sup> See *Robinson*, 462 Mich at 459 (citing *Johnson v Bd of Co Comm'rs of Ontonagon Co*, 253 Mich 465; 235 NW 221 (1931)).

The Court of Appeals erred in its analysis of the interpretation of "property damage" by utilizing a "more expansive definition of "property" found in 63C Am Jur 2d, Property, § 1, pp 66-68 and by ignoring the *Ross* mandate that exceptions to the government's immunity be narrowly drawn.<sup>44</sup> As a result, the Court of Appeals concluded the term "property damage" as used in the proprietary function exception included Plaintiffs' alleged "harm or injury to their right of lawful, unrestricted use of the res for the particular business purpose that they had negotiated."<sup>45</sup>

Black's Law Dictionary's first definition of "property" is the most narrow: "[t]he right to possess, use, and enjoy a determinate thing."<sup>46</sup> Black's goes on to describe the various definitions of property, from use of the term in its widest sense to including all of a person's legal rights, to its narrowest use as including "nothing more than corporeal property—that is to say, the right of ownership in a material object, or that object itself."<sup>47</sup> Given *Ross*'s mandate that exceptions to the government's are narrowly drawn, the Court should apply a narrow definition of the word "property"—that is, a corporeal, physical object over which one has a right of ownership—rather than its broadest definition. Nothing in the proprietary function exception demands a different, broader interpretation of the word "property." To hold otherwise would inappropriately expand the application of this exception to impose liability in every situation where the government engages in a proprietary function and that competition, alone, causes direct or indirect economic loss to private business.

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<sup>44</sup> *Wolf*, 269 Mich App at 271-272.

<sup>45</sup> *Wolf*, 269 Mich App at 272.

<sup>46</sup> Black's Law Dictionary, p 1232 (7th ed 1999) (emphasis added); see also *Costa*, 475 Mich at 410 n 2 (Michigan Supreme Court turning to Black's Law Dictionary to define "immunity" in a interpreting the application of governmental immunity in the medical malpractice context).

<sup>47</sup> Black's Law Dictionary, p 1232 (citing Salmond, Jurisprudence, pp 423-24, Glanville L Williams ed, 10th ed 1947).

In sum, a plaintiff's claim for non-physical economic loss or injury or loss other than to physical, tangible objects, should not be encompassed within the "property damage" recoverable under the proprietary function exception. A more appropriate, narrower construction of the term "property damage" than that applied by the Court of Appeals would require actual loss of or physical injury to a physical, corporeal object over which the plaintiff has ownership. Accordingly, economic damages for the tortious interference with a business relationship or purpose would not be encompassed by the more appropriate, narrower construction of the phrase "property damage."

## CONCLUSION

Applying the narrow construction mandated by this Court's decisions to the phrase "property damage" as used in the proprietary function exception to governmental immunity compels the conclusion that the government is liable only for actual physical damage to tangible, corporeal, physical objects over which a plaintiff has ownership. To hold otherwise would expand the exception beyond the scope intended by the Legislature when it enacted the propriety function exception to its broad grant of governmental immunity.

WHEREFORE, Attorney General Michael A. Cox respectfully urges this Honorable Court to reverse the Court of Appeals and hold that MCL 691.1413 excludes all types of property damage other than actual physical damage to real or personal property arising from the performance of a proprietary function.

Respectfully submitted,

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